80-75

No.

Supreme Court, U. S.
FILED
JUL 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

KECO INDUSTRIES, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN J. BARRETT
Counsel for Petitioner
Keco Industries, Inc.
26 Broadway
New York, New York 10004
(212) 422-8180

Of Counsel:
WARREN H. COLODNER
ROBERT C. MACEK
BARRETT SMITH SCHAPIRO
SIMON & ARMSTRONG

IN THE

Supreme Court of the United States

October Term, 1980

KECO INDUSTRIES, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Question Presented

Whether the Equal Employment Opportunity Commission may, consistent with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, institute and maintain suit and withstand a motion for summary judgment solely on the basis of information contained in an affirmative action program prepared and submitted by an employer pursuant to Executive Order 11246 and specifically approved by the delegate of the Secretary of Labor.

Table of Contents

	PAGE
Question Presented	1
Relief Requested	1
Opinions Below	1
Jurisdiction	1
Statutes, Executive Orders and Regulations Involved	1
Statement of the Case	2
Keco's Affirmative Action Program	3
EEOC Investigates the Grimes Charge	4
Grimes and EEOC Sue Keco in Separate Actions	6
The Decisions Below	8
Reasons for Granting the Writ	8
Conclusion	11
Appendices	
Appendix A—Court of Appeals Opinion	1a
Appendix B—Judgment of Court of Appeals	9a
Appendix C—Court of Appeals Order Denying Petition for Rehearing	10a
Appendix D—District Court Opinion Granting Summary Judgment	11a
Appendix E—District Court Opinion Denying EEOC's Motion to Reconsider Grant of Summary Judgment	13a
Appendix F—Statutes, Executive Order and Regulations Involved	15a

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES

PAGE

Cases:

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 9

Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971) 2

EEOC v. Continental Oil Co., 548 F.2d 884 (10th Cir. 1977) 6n

EEOC v. Huttig Sash & Door Co., 511 F.2d 453 (5th Cir. 1975) 6n

EEOC v. Kimberly-Clark Corp., 511 F.2d 1352 (6th Cir.), *cert. denied,* 423 U.S. 994 (1975) 6n

EEOC v. Missouri Pacific R. Co., 493 F.2d 71 (8th Cir. 1974) 6n

EEOC v. North Hills Passavant Hospital, 544 F.2d 664 (3d Cir. 1976) 6n

Fullilove v. Klutznick, —— U.S. ——, 48 U.S.L.W. 4979 (July 2, 1980) 10

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 9

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 9

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 9

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 4n, 9

PAGE

Statutes:

28 U.S.C. § 1254(1) 1
42 U.S.C. § 2000e ..... i, 1
42 U.S.C. § 2000e-2(a) 2n
42 U.S.C. § 2000e-5(f)(1) 6

Executive Orders:

Executive Order No. 11246, 30 Fed. Reg. 12319 (1965), *as amended by* Executive Order No. 11375, 32 Fed. Reg. 14303 (1967) ..... i, 1, 3, 3n, 4, 4n
§ 202 ..... 2n
§ 205 ..... 3n

Regulations:

41 C.F.R. § 60-1.6 1
41 C.F.R. § 60-1.6(a) 3n
41 C.F.R. § 60-1.40 1
Order No. 4 of the Secretary of Labor, 41 C.F.R. § 60-2 ..... 1, 3, 4n
§ 60-2.2 ..... 3n

Relief Requested

The petitioner Keco Industries, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 20, 1980.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra*), is reported at 617 F.2d 443. The opinions of the District Court for the Southern District of Ohio, granting summary judgment in favor of petitioner on July 1, 1977 (App. D, *infra*) and denying EEOC's motion for reconsideration on August 28, 1977 (App. E, *infra*), are not reported.

Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was entered on March 20, 1980 (App. B, *infra*). A timely petition for rehearing was denied on April 18, 1980 (App. C, *infra*), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutes, Executive Orders and Regulations Involved

Selected provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*, Executive Order 11246, 30 Fed. Reg. 12319 (1965), *as amended by* Executive Order No. 11375, 32 Fed. Reg. 14303 (1967), *reprinted in* 42 U.S.C. §2000e at 1232 (1976), 41 C.F.R. §§60-1.6 and 60-1.40 (1971), and Order No. 4 of the Secretary of Labor, 41 C.F.R. §60-2 (1971), are reproduced in Appendix F, *infra*.

Statement of the Case

Petitioner Keco Industries, Inc. ("Keco") is a government contractor* subject to the provisions against discrimination in employment imposed by Executive Order 11246, as amended.** Executive Order 11246 requires government contractors, such as Keco, not to discriminate in employment and to "*take affirmative action to ensure*" that applicants and employees are not discriminated against.†

* Keco is a manufacturer of specialized air-conditioning equipment, most of which is sold pursuant to federal government procurement contracts. At the times relevant here, Keco employed an aggregate of less than 250 persons at its Cincinnati, Ohio and Santa Ana, California plants.

** The history of executive efforts concerning fair employment practices of government contractors is traced in *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159, 168-71 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

† The prohibitions of Title VII and those of Executive Order 11246 are essentially identical. Executive Order 11246, §202 requires that the contractor agree that:

> "The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship."

Substantially equivalent language is contained in Title VII, 42 U.S.C. §2000e-2(a), which forbids an employer:

> "(1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The provision for affirmative action programs was implemented by the Secretary of Labor in his Order No. 4, 41 C.F.R. §60-2 (1971).

Keco's Affirmative Action Program

In October, 1970, Keco voluntarily filed a memorandum which, together with accomanying exhibits, set forth an affirmative action program, with the Office of Contracts Compliance of the Defense Supply Agency ("DSA"), to which the Secretary of Labor had delegated the responsibility for reviewing such plans for compliance with Executive Order 11246 and Order No. 4.* Keco's submission provided detailed information concerning its employment practices and work force, including (as required by Order No. 4) an analysis of Keco's utilization of minorities and women in each job category and a tabular analysis of job classifications and rates.

The crucial fact in this case is that Keco's October 1970 affirmative action submission became, more than nine years later, the only purported basis for the Sixth Circuit's reinstatement of EEOC's action against Keco.

It is undisputed that the affirmative action program submitted for approval by Keco in October 1970 (the "Affirmative Action Program") was a revised version of an affirmative action program, dated July 9, 1969, which had already been approved by the DSA. Prior to Keco's October 1970 submission, a DSA contractor relations

* Executive Order 11246, §205 and 41 C.F.R. §§ 60-1.6(a) and 60-2.2 assign primary responsibility for obtaining compliance with Executive Order 11246 and Order No. 4 to each government contracting agency, in cooperation with the Office of Federal Contract Compliance ("OFCC") of the Department of Labor.

specialist, Roland Ferris, had personally conducted a "compliance review" of Keco's Cincinnati plant. On December 4, 1970, Ferris wrote to Keco approving the October 1970 Affirmative Action Program, stating:

> "A detailed analysis of your written Affirmative Action Program revealed that your facility is in compliance with Order Number 4 Revised.
>
> "Your concern with the utilization of minority group persons and your desire to further enhance your Equal Employment Opportunity profile is sincerely appreciated." (Ferris Dep. Ex. 4-D.)*

Subsequent revisions of Keco's Affirmative Action Program were similarly approved by the DSA on July 7, 1972, August 22, 1973, and September 22, 1975 (Ferris Dep. Exs. 7, 8 and 9). In addition, since the filing of EEOC's complaint herein and through the present, Keco's periodically revised affirmative action program has continued to be approved by the DSA and Keco's plant has always been found to be in compliance with Executive Order 11246.

EEOC Investigates the Grimes Charge

Approximately one year after Keco's initial submission of an affirmative action program, and several months before the October 1970 program was approved, Lena J. Grimes, an office employee of Keco, filed a charge of sex discrimination with the EEOC in which she asserted that she had been paid less than male employees allegedly

* The affirmative action program considered by this Court in *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979), had been similarly submitted for approval to, and approved by, the OFCC under Executive Order 11246 and Order No. 4.

doing the same job. Keco has consistently denied that Mrs. Grimes performed the same functions or exercised the same responsibility as those male employees.

Keco was notified of the Grimes charge for the first time on February 3, 1971, more than six months after it had been filed. On that day, the charge was served on Keco by an EEOC investigator, who immediately thereafter inspected certain of Keco's books and records and interviewed Keco's management.* Except for production of a copy of Keco's Affirmative Action Program, this visit to Keco comprised the entire EEOC investigation of the Grimes complaint.

Thereafter, on April 7, 1971, the Cleveland District Director of the EEOC, Chester J. Gray, issued for Keco's comments proposed "findings of fact" concerning the Grimes complaint (Ferris Dep. Ex. 4-P), basing these solely on the written EEOC file. Keco responded in detail on April 22, 1971. (Ferris Dep. Ex. 4-S.)

More than three years later, on May 31, 1974, EEOC issued a determination that there was "reasonable cause" to believe that Grimes had been discriminated against (Ferris Dep. Ex. 4-CC). That determination, which was based solely on the EEOC written file, relied on certain alleged disparities in pay between Grimes and male Keco employees who were said to perform the same functions.

* Before contacting EEOC, Grimes had resigned from Keco. In late 1970, however, after she had instituted her charge but before Keco had been notified of its pendency, she voluntarily returned to Keco as a temporary employee at the same allegedly discriminatory rate of pay. Grimes voluntarily left Keco's employ before Keco was served with her charge.

The "determination" also noted "a like and related issue" concerning Keco's allegedly "sex-segregated job classification in Assembly, whereby male jobs pay fifteen to ninety-five cents more than female jobs"—allegations again based solely on data supplied in the October 1970 Affirmative Action Program. That "determination" was signed by the very same Roland Ferris who had approved that Affirmative Action Program.*

Grimes and EEOC Sue Keco in Separate Actions

On September 13, 1974, the EEOC issued to Grimes, at her request, a "right to sue" letter pursuant to 42 U.S.C. §2000e-5(f)(1). On December 6, 1974, Grimes commenced an action against Keco in the district court, alleging that Keco had discriminated against her on the basis of sex solely in that she allegedly had been paid at a lower rate than male employees performing the same work.

More than nine months later, on September 22, 1975, EEOC filed the instant action, the allegations of which are far broader than those of the Grimes complaint.

The prior commencement of the private lawsuit limited EECC to permissive intervention unless its action raised substantially different issues and sought relief other than that asserted by Grimes.** A central issue in the courts

---

* In 1972, Ferris had been appointed director of the newly-established Cincinnati office of the EEOC.

** *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1362-63 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975); *EEOC* v. *Continental Oil Co.*, 548 F.2d 884 (10th Cir. 1977); *EEOC* v. *Huttig Sash & Door Co.*, 511 F.2d 453, 455 (5th Cir. 1975); *EEOC* v. *Missouri Pacific R. Co.*, 493 F.2d 71, 73-75 (8th Cir. 1974). But see *EEOC* v. *North Hills Passavant Hospital*, 544 F.2d 664 (3d Cir. 1976).

below therefore was whether EEOC's claims were broader than those asserted by Grimes. Although the allegations of the EEOC complaint are stated in broader terms than the Grimes complaint, EEOC conceded in answers to interrogatories that its allegations of sex discrimination were "based solely upon the administrative file for the *Grimes* v. *Keco* charge."* Thereafter, in EEOC's memorandum submitted in opposition to Keco's motion for summary judgment, EEOC set forth no alleged factual basis for its claims other than the administrative record compiled in the Grimes investigation. Rather, EEOC relied solely on the expressed hope that additional matters might be uncovered in future discovery.

---

* The answers to other interrogatories and depositions of EEOC personnel similarly indicated that EEOC had no purported basis for asserting claims beyond those asserted by Grimes. See the Sixth Circuit's discussion at App. 4a-6a.

EEOC's answers also showed that other allegations of the complaint were highly inflated and misleading. Although the complaint (¶6) alleged that "person*s* claiming to be aggrieved filed charge*s* with the Commission alleging violations of Title VII" by Keco (emphasis supplied), EEOC's answers indicated that, except for Grimes, no one had ever filed a charge of sex discrimination against Keco. The only three other charges ever filed were by males; two of these, alleging race discrimination, were disposed of by "no cause" determinations by EEOC; the third, of unknown nature, was "terminated without jurisdiction" by EEOC and was never served on Keco. In addition, since Grimes had complained of discrimination only between October 1968 and April 1970 and EEOC's investigator had focussed only on those dates, EEOC's admission that its complaint was based solely on its file in the Grimes matter similarly cut the ground from beneath its ambitious allegations that Keco had engaged in employment discrimination "[s]ince at least July 2, 1965 [the effective date of Title VII], and continuously up to the present time" (Complaint, ¶7). Thus, EEOC had no purported basis except the Grimes complaint and the Affirmative Action Program for instituting this action.

The Decisions Below

The District Court granted summary judgment against EEOC, holding that

> "the EEOC investigation in connection with the Grimes matter produced nothing to warrant the allegations of the EEOC complaint . . . extending beyond the Grimes charge." (App. 12a.)*

In reversing, the Sixth Circuit refused to be bound by EEOC's responses to the interrogatories. In searching the record, the Sixth Circuit found that the data contained in the October 1970 Affirmative Action Program submission had created an issue of fact as to whether the Grimes case and this action were identical. (App. 6a-8a.)**

Reasons for Granting the Writ

The Sixth Circuit's decision is flatly inconsistent with Congressional policy favoring the voluntary elimination of the effects of past discrimination and, if not reversed, will tend to discourage voluntary compliance with Title VII's mandate.

---

* The Grimes action, which had been consolidated with the EEOC action, remains pending in the District Court.

** The Sixth Circuit also found an issue of fact to exist with respect to whether Keco had failed to submit certain required "EEO-1" reports to the EEOC (App. 3a-4a). EEOC's brief did not seek reversal on this ground, and Keco maintains that certain Small Business Administration forms which it filed in 1974 and 1975 were equivalent to EEO-1 forms. Although EEOC's abandonment of this claim concerning the forms suggests that the issue is trivial and hyper-technical at best, we concede that it remains extant.

This Court has repeatedly emphasized that Title VII was enacted in order to

> "assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 800 (1973); *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 429-430 (1971)." *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 44 (1974).

Congress recognized, however, that the achievement of this goal was largely dependent upon voluntary compliance by employers. *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 44; *see also Regents of the University of California* v. *Bakke,* 438 U.S. 265, 336-38, 364 n.38 (1978) (opinion of Brennan, White, Marshall and Blackmun, JJ.). The legislative history of the Act, which this Court recently reviewed in *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979), makes clear that affirmative action programs, such as those adopted by Keco, are among the forms which such favored voluntary compliance may take. Indeed, a primary ground for this Court's holding that the affirmative action program in *Weber* did not violate Title VII was its practical realization that an interpretation of Title VII which "forbade all race conscious actions" would powerfully discourage employers' voluntary efforts to eliminate discrimination in employment and thus "would 'bring about an end completely at variance with the purpose of the statute.' " *United Steelworkers of America* v. *Weber, supra,* 443 U.S. at 202.

As was the situation in *Weber,* the appellate decision in this case "places voluntary compliance with Title VII

in profound jeopardy." 443 U.S. at 210 (Blackmun, J., concurring). Keco has voluntarily adopted affirmative action programs, which the Government has approved over a 10-year period, and has recognized its responsibility to encourage the employment and promotion of persons from previously disadvantaged groups. Yet the EEOC lawsuit which the Sixth Circuit reinstated is concededly based solely upon data contained in these affirmative action programs and EEOC's misguided hope that it can find support for its charges by conducting a time consuming and needlessly expensive fishing expedition through Keco's files. If this result is permitted to stand, any employer in the future who voluntarily files an affirmative action program in good faith with the Government will do so at the peril of being sued for alleged past discrimination based upon such documentation.

This Court has recently recognized the compelling public interest in affirmative action to overcome the effects of past discrimination in employment. *Fullilove* v. *Klutznick*, —— U.S. ——, 48 U.S.L.W. 4979 (July 2, 1980). The Court of Appeals' decision sanctions the use of such affirmative action programs as swords against employers and will inevitably discourage the submission and adoption of such programs. This result would be contrary to the public interest and a clear departure from the intent of Congress.

Conclusion

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Sixth Circuit.

July 16, 1980

Respectfully submitted,

JOHN J. BARRETT
Counsel for Petitioner
Keco Industries, Inc.
26 Broadway
New York, New York 10004
(212) 422-8180

Of Counsel:
WARREN H. COLODNER
ROBERT C. MACEK
BARRETT SMITH SCHAPIRO
SIMON & ARMSTRONG

Appendices

APPENDIX A

Court of Appeals Opinion

No. 77-3498

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

KECO INDUSTRIES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed March 20, 1980.

Before: ENGEL and KENNEDY, Circuit Judges, and PECK, Senior Circuit Judge.

KENNEDY, Circuit Judge. The Equal Employment Opportunity Commission (EEOC) appeals from the District Court's grant of summary judgment to the defendant Keco Industries, Inc. (Keco). This Court, upon review of the entire record, finds that there are issues of material fact in dispute and remands the case to the District Court for further proceedings.

Appendix A—Court of Appeals Opinion

Mrs. Lena Grimes, an employee of Keco, filed a charge with the EEOC on July 22, 1970, alleging sex discrimination in that, although she was promoted to the position of buyer, she never received the same pay as the male buyers. Investigative interviews were conducted in February 1971 and the Regional Director made findings of fact in April 1971. A Determination of Probable Cause was made May 1, 1974. Mrs. Grimes was notified of her right to sue July 9, 1974 and filed suit December 6, 1974. On September 22, 1975 the EEOC filed the instant action. Its motion to consolidate the two actions was granted by the District Court.

Thereafter, Keco moved to dismiss the EEOC's complaint as being merely duplicative of the Grimes' complaint.[1] The District Court held that the complaint alleged charges broader than those in Grimes' complaint and refused to dismiss the case. After taking depositions and serving interrogatories upon EEOC, Keco moved for summary judgment, arguing that the EEOC's answers to the interrogatories indicated that it had nothing except Grimes' charge as a basis for its allegations. The District Court agreed that EEOC's answers to interrogatories indicated it had nothing broader than Grimes' charge and that it could not depend upon discovery to seek to establish it had anything broader.

On appeal, EEOC points to its Determination of Probable Cause as proof it has a broader claim than Grimes'

[1] This Court held in *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1362-63 (6th Cir. 1975), *cert. denied*, 423 U.S. 994, that Congress did not intend the EEOC to use its power to bring suits to duplicate actions brought by private parties. However, the EEOC's complaint should not be dismissed (but could be consolidated with the private action) if the EEOC's investigation of the private party's suit disclosed a number of violations with a discriminatory impact extending beyond the particular situation of the private party.

charge. Keco objects to the EEOC's reliance on this document since it is merely the unsworn determination by a party to the litigation and should be treated in the same fashion as an allegation of a complaint. It claims that as EEOC has not presented any affidavits, depositions, or other sworn testimony, it failed to meet the requirements of Fed. R. Civ. Pro. 56(e) for opposing a motion for summary judgment and thus must fail.

The allegations of the EEOC complaint are clearly broader than those alleged by Mrs. Grimes. Her complaint states that Keco discriminated on the basis of sex by not paying her the same wages as men who performed the same job, that of buyer. The EEOC, in ¶ 7 of its complaint, alleges Keco engaged in unlawful employment practices, to wit: (a) failing to pay females on the same basis as males; (b) assigning women to lower paying clerical jobs and refusing them advancement to management and supervisory positions; and (c) maintaining job classifications segregated on the basis of sex. In ¶ 9 of its complaint, EEOC alleges that since 1971 Keco failed to submit to the EEOC the Employer Information Report EEO-1 (EEO-1 Report [Standard Form 100]) as required by § 709(c) of Title VII and 29 C.F.R. § 1602.7. This Court must examine the EEOC's answers to Keco's interrogatories to determine if those answers show there is no issue of fact with respect to the broader allegations.

With respect to the failure to file EEO-1 reports, the EEOC's answers to interrogatories stated that the Commission's Office of Research, the division of the Commission which receives and has custody of EEO-1's [Standard Form 100] found no record of EEO-1 reports for Keco Industries, Inc. for the years 1972, 1973, 1974, and 1975. By

affidavit, David M. Levin stated that he made a diligent inquiry of the Office of Research, but no EEO-1's could be found for Keco for 1972 through 1975 (Exhibit D, attached to Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss). By affidavit, Marguerite Downing, Keco's Office manager, stated that filings of EEO-1's were made 1970 through 1975. Attached to the affidavit were copies of EEO-1's for February 1971, May 1972, and May 1973. However, for 1973, 1974, and 1975, copies of the Small Business Administration Compliance Report were attached rather than EEO-1's. (The record does not state whether these are equivalent.) The affidavits clearly show a material issue of fact whether or not Keco filed the proper papers. EEOC's answers to interrogatories did not remove this issue of disputed fact. The District Court was in error in dismissing the complaint with respect to ¶ 9.

The more important issue relates to the charges of sex discrimination. In its answer to question 4, the EEOC admitted that only four persons have filed charges against Keco, and only one, Mrs. Grimes, is a sex discrimination charge. Question 5 asked EEOC to specify the names of individuals affected and the nature of all the alleged unlawful employment practices mentioned in EEOC's complaint, ¶ 7. EEOC answered:

> The names of those persons affected by the Defendant's alleged unlawful employment practices and the dates they were affected will be made available to Defendant after Plaintiff has conducted discovery. The names of witnesses and a list of places, where relevant, will be provided to Defendant after the Plaintiff has conducted discovery.

Question 6 asked the EEOC to state the policies and practices of Keco upon which ¶ 7 of the complaint was based and

to identify all documents, records, or writings in which such practices were set forth. EEOC answered:

> The allegations in paragraph 7 of Plaintiff's complaint are based upon the reasonable cause determination on the issues of equal pay and sex segregated job classifications, in the Grimes' charge. All discoverable documents, records or writings contained in the Grimes file, and upon which the reasonable cause determinations are based have been made available to the Defendant pursuant to the Defendant's subpoena issued by the U.S. District Court, Southern District of Ohio, Western Division on December 30, 1975.

The answer to question 13 stated that the EEOC's complaint was based solely upon the administrative file in the Grimes' case and the inquiry with the EEOC's Office of Research. Questions 15, 16, and 17 asked for the identity of each female whom Keco allegedly failed to pay on the same basis as males, assigned to lower paying clerical jobs, or refused advancement. To each question, EEOC answered, "Lena J. Grimes and those females to be identified during discovery." Question 18 asked EEOC to identify each job classification at Keco wherein there is allegedly segregation on the basis of sex, to which EEOC replied, "A list of sex segregated job classifications will be made available to defendant after plaintiff has conducted discovery."

The District Court held that these answers indicated that the EEOC had nothing upon which to base a claim broader than Mrs. Grimes' claim. The EEOC had no *names* other than Mrs. Grimes' name, but it did not admit that there were no other persons. In its answer to question 6, it pointed to Grimes' administrative file to support its broader claims in ¶ 7 of its complaint. Were the Court

to confine its inquiry to the answers to the interrogatories, it would agree with the District Court that the EEOC has not demonstrated that there is a material issue of fact which is broader than the Grimes' charge.

The fact that the EEOC's answers do not disclose the existence of a material dispute does not end the inquiry for the trial judge. Fed. R. Civ. Pro. 56 provides that the judge need only consider pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, but it does not require a party to affirmatively respond by affidavit or deposition to a motion for summary judgment. *See Smith* v. *Hudson,* 600 F.2d 60, 63-65 (6th Cir. 1979). The burden of establishing that no material fact exists remains on the moving party. The trial judge must carefully examine the entire record to see if a material issue of fact is in dispute. If sworn evidence already in the record demonstrates the existence of a material issue of fact, the motion for summary judgment should be denied.

The contents of the administrative file, mentioned in EEOC's answers to question 13, were identified by the District Director, Mr. Ferris, during his deposition, and copies of all the papers in the file were attached thereto. Mr. Ferris was the person who made the Determination of Probable Cause mentioned in EEOC's answer to question 6. He testified that his inquiry was limited to the file. (Dep., pp. 48-49). He testified that while he was working for the Department of Defense, he reviewed Keco's Affirmative Action Program and identified the exhibit as the Affirmative Action Program he reviewed. This Affirmative Action Program, the Regional Director's Findings of Fact, Keco's Objections to the Findings of Fact, resumes of people who

had applied for the position of buyer at Keco, and investigative reports were among the items in the file.

A copy of the Affirmative Action Program was also attached to the Defendant's Motion for Reconsideration together with an affidavit by Mr. Adair stating that attached was a true copy of what was submitted to Mr. Ferris in October and November 1970 (when he worked for the Department of Defense) and to the officer investigating the Grimes' charge. He denies any sex discrimination or discriminatory intent. Keco's answer to EEOC's interrogatory 16, which asked for identification of all documents containing job descriptions or job classifications, listed the Keco Red Book and the Keco Affirmative Action Program.

It is thus clear from the record that the Affirmative Action Program was a part of the sworn record. That program, in Part VII, notes an underutilization of minorities and women in the Officials and Managers and the Office and Clerical categories, although it denies any discriminatory intent. Exhibit A to the program shows that in the General Assembly, Electrical Assembly, and Refrigerator Assembly job classifications, the jobs appear to be segregated by sex and that the female jobs start at $.20 an hour less than the male jobs and end almost $.90 per hour less. In its objections to the Regional Director's Findings of Fact, Keco objected to the finding that it had a separate and different wage rate in the assembly job classification which was higher for males than for females. Keco admitted the accuracy of what was stated, but insisted the jobs did not involve the same work and that the differences in pay were directly related to differences in

work. Keco did not state whether there was a bona fide occupational qualification for making one job for males only and one job for females only. These documents identified in the sworn record create an issue of fact as to whether Keco maintained a sex-segregated job classification in its assembly operations. This claim is not adequately covered by Grimes' complaint.

We find inexcusable the failure of the EEOC to draw to the attention of the District Court or of this Court the sworn evidence in the record on which it was entitled to rely. Its answers to interrogatories should have identified the other persons and job classifications. Its response to the motion for summary judgment should have directed the District Judge to the sworn evidence that supported its position and created an issue of fact. The record in this case is voluminous and confusing. Overburdened District Judges should be able to rely upon counsel who are familiar with depositions, documents, and affidavits in the file to locate the relevant information. Nonetheless, since the record does disclose material issues of fact, the District Court erred in granting summary judgment. The judgment is reversed and the action remanded for further proceedings not inconsistent with this opinion.

APPENDIX B

Judgment of Court of Appeals

(Filed March 20, 1980)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-3498

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

KECO INDUSTRIES, INC.,
Defendant-Appellee.

Before: ENGEL and KENNEDY, Circuit Judges, and PECK, Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for further proceedings.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN,
Clerk

APPENDIX C

Court of Appeals Order Denying Petition for Rehearing

(Filed April 18, 1980)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-3498

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

KECO INDUSTRIES, INC.,
Defendant-Appellee.

Before: ENGEL and KENNEDY, Circuit Judges, and PECK, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed herein by defendant-appellee, the Court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

IT IS THEREFORE ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN,
Clerk

APPENDIX D

District Court Opinion Granting Summary Judgment

(Filed July 1, 1977)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-74-485

LENA J. GRIMES,
Plaintiff,

v.

KECO INDUSTRIES, INC.,
Defendant.

No. C-1-75-337

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

KECO INDUSTRIES, INC.,
Defendant.

ORDER

In these consolidated actions the defendant has now renewed a motion for summary judgment in C-1-75-337.

The original motion (passed on and denied on February 19, 1976) was based on the assertion that once a private suit is filed on a Title VII claim pursuant to a right to sue letter, the EEOC may not file suit in addition but is relegated to permissive statutory intervention. *See EEOC* v.

Appendix D

District Court Opinion Granting Summary Judgment

R.R., 493 F.2d 71 (8th Cir. 1974). The denial of the motion as originally filed was based on *EEOC* v. *Kimberly-Clark*, 511 F.2d 1352 (6th Cir. 1975) and particularly the reasons at page 1363.

Since then, the defendant has developed through discovery (interrogatories and answers thereto) that the EEOC investigation in connection with the Grimes matter produced nothing to warrant the allegations of the EEOC complaint under consideration extending beyond the Grimes charge.

The EEOC's opposition (brief) to the renewed motion concedes that its investigation of the Grimes charge revealed nothing in addition to or broadening. It claims that it may depend on discovery in this case.

The EEOC position seems to be beyond the scope of the *Kimberly-Clark case.* As we read that decision, it authorizes an EEOC case in addition to one filed by a charging party if and to the extent additional charges are made, "based on its investigation's revelations"—or stated otherwise, as in footnote 15 on page 1363, "to allow the EEOC to bring suit based on the *findings* its investigation warrants."

In this case it now appears on the record affirmatively that the EEOC investigations into Grimes revealed nothing based on which the charges could be enlarged. The EEOC asserts that the void may be filled by discovery in this case. That it seems is broader than *Kimberly-Clark.*

The renewed motion for summary judgment is sustained.

/s/ TIMOTHY S. HOGAN

Timothy S. Hogan
United States District Judge

APPENDIX E

District Court Opinion Denying EEOC's Motion to Reconsider Grant of Summary Judgment

(Filed August 28, 1977)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-74-485

LENA J. GRIMES,

Plaintiff,

v.

KECO INDUSTRIES, INC.,

Defendant.

No. C-1-75-337

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

KECO INDUSTRIES, INC.,

Defendant.

On July 1, 1977, this Court entered an order sustaining defendant's motion for summary judgment against the EEOC. The Commission moved this Court for reconsideration of that order on July 15, 1977. Defendant KECO filed a memorandum in opposition to plaintiff EEOC's motion to reconsider on July 21, 1977.

Appendix E

District Court Opinion Denying EEOC's Motion to Reconsider Grant of Summary Judgment

The Court based its July 1 order on the factual difference between this case and the case of *EEOC* v. *Kimberly-Clark Corp.*, 511 F. 2d 1352, 1363, (10 FEP cases 38 (6th Cir. 1975). There the Court of Appeals held that the Commission might file its own suit independent of the private parties, rather than seek permissive intervention into the private party's suit, because the EEOC investigation of the private party's charge disclosed discriminatory company practices beyond the private plaintiff's particular situation. In the case *sub judice* this Court found that, since KECO's original motion for summary judgment (denied on February 19, 1976), KECO had developed through discovery that the EEOC investigation in connection with the Grimes matter had produced nothing to warrant the allegations of the EEOC complaint under consideration extending beyond the Grimes charge.

Also, the Court noted that the EEOC had conceded in its brief that its investigation revealed nothing beyond the Grimes charge. The EEOC now asserts that the Court misinterpreted its arguments to arrive at the conclusion that the EEOC had thus conceded.

Be that as it may, the Court finds no reason to change its earlier holding: 1) that KECO's discovery has demonstrated that the EEOC investigation of the Grimes matter has revealed nothing in addition to or broadening the Grimes charge; and 2) that the EEOC's assertion that the voids may be filled by discovery goes beyond the scope of *Kimberly-Clark, supra.*

The motion for reconsideration is denied.

/s/ Timothy S. Hogan

United States District Judge

APPENDIX F

Statutes, Executive Order and Regulations Involved

42 U.S.C. § 2000e-2:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

42 U.S.C. § 2000e-5:

* * *

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commis-

sion has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the

court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discreition, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

* * *

EXECUTIVE ORDER NO. 11246

Sept. 24, 1965, 30 Fed. Reg. 12319, as amended by Ex.Ord. No.11375, Oct. 13, 1967, 32 Fed. Reg. 14303; Ex.Ord.No. 11478, Aug. 8, 1969, 34 Fed. Reg. 12985, reprinted in 42 U.S.C. § 2000e, at 1232 (1976)

EQUAL OPPORTUNITY IN
FEDERAL EMPLOYMENT

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

PART I—NONDISCRIMINATION IN GOVERNMENT EMPLOYMENT
[Superseded by Ex.Ord.No.11478, Aug. 8, 1969,
34 F.R. 12985]

Appendix F

Statutes, Executive Order and Regulations Involved

PART II—NONDISCRIMINATION IN EMPLOYMENT BY GOVERNMENT CONTRACTORS AND SUBCONTRACTORS

SUBPART A—DUTIES OF THE SECRETARY OF LABOR

Sec. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

SUBPART B—CONTRACTORS' AGREEMENTS

Sec. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or natural origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or natural origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be

provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or natural origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

Appendix F

Statutes, Executive Order and Regulations Involved

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of Sept. 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

Sec. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compli-

ance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: *Provided,* That to the extent such information is within the exclusive possession of a labor union or an agency referring workers or providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall

set forth what effort he has made to obtain such information.

(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, religion, sex or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require.

Sec. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase

order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided,* That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: *And provided further,* That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

SUBPART C—POWERS AND DUTIES OF THE SECRETARY OF LABOR AND THE CONTRACTING AGENCIES

Sec. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order

and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Sepretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

Sec. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secdetary of Labor by a contracting agency, that agency shall report to the Secretary what action has been taken or is recommended with regard to such complaints.

Appendix F

Statutes, Executive Order and Regulations Involved

Sec. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

Sec. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

Appendix F

Statutes, Executive Order and Regulations Involved

SUBPART D—SANCTIONS AND PENALTIES

Sec. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

Appendix F

Statutes, Executive Order and Regulations Involved

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a)(2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a)(5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

Sec. 210. Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and

regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

Sec. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

Sec. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209(a)(6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor, or the contracting agency involved, shall promptly notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agency which imposed the sanction.

[Sections 213-15 and Parts III and IV
not reproduced]

Appendix F

Statutes, Executive Order and Regulations Involved

Secretary of Labor's Regulations Concerning Federal Contract Compliance and Equal Employment Opportunity, 41 C.F.R. Part 60 (1971)

41 C.F.R. PART 60-1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

Subpart A—Preliminary Matters; Equal Opportunity Clause; Compliance Reports

* * *

§ 60-1.6 Duties of agencies.

(a) *General responsibility.* Each agency shall be primarily responsible for obtaining compliance with the equal opportunity clause, the order, the regulations in this part, and orders issued pursuant thereto. Each agency shall cooperate with the Director and shall furnish him such information and assistance as he may require in the performance of his functions under the order. Such information shall include compliance review reports, schedules of compliance reviews and any other information relevant to the administration of the order.

(b) *Agency program.* The head of each agency shall, subject to the prior approval of the Director, establish a program and promulgate procedures to carry out the agency's responsibilities for obtaining compliance with the order and regulations and orders issued pursuant thereto. Each agency head shall also designate a Contract Compliance Officer, who (unless otherwise approved by the Director) shall be appointed by the head of the agency from among the agency's executive personnel to whom the Ex-

ecutive Schedule applies, and such officer shall be subject to the immediate supervision of the head of the agency. All compliance reviews required pursuant to the regulations in this part and such other compliance reviews as the Contract Compliance Officer determines to be appropriate shall be conducted by him or his designee. The head of the agency or the Contract Compliance Officer may also designate a Deputy Contract Compliance Officer to assist the Contract Compliance Officer in the performance of his duties. The names of the Contract Compliance Officers and the Deputy Contract Compliance Officers, their addresses and telephone numbers, and any changes made in their designation shall be furnished to the Director.

* * *

Subpart C—Ancillary Matters

§ 60–1.40 Affirmative action compliance programs.

(a) *Requirements of programs.* Each agency or applicant shall require each prime contractor who has 50 or more employees and a contract of $50,000 or more and each prime contractor and subcontractor shall require each subcontractor who has 50 or more employees and a subcontract of $50,000 or more to develop a written affirmative compliance program for each of its establishments. A necessary prerequisite to the development of a satisfactory affirmative action program is the identification and analysis of problem areas inherent in minority employment and an evaluation of opportunities for utilization of minority group personnel. The contractor's program shall provide in detail for specific steps to guarantee equal employment

opportunity keyed to the problems and needs of members of minority groups, including, when there are deficiencies, the development of specific goals and time tables for the prompt achievement of full and equal employment opportunity. Each contractor shall include in his affirmative action compliance program a table of job classifications. This table should include but need not be limited to job titles, principal duties (and auxiliary duties, if any), rates of pay, and where more than one rate of pay applies (because of length of time in the job or other factors) the applicable rates. The affirmative action compliance program shall be signed by an executive official of the contractor.

(b) *Utilization evaluation.* The evaluation of utilization of minority group personnel shall include the following:

(1) An analysis of minority group representation in all job categories.

(2) An analysis of hiring practices for the past year, including recruitment sources and testing, to determine whether equal employment opportunity is being afforded in all job categories.

(3) An analysis of upgrading, transfer and promotion for the past year to determine whether equal employment opportunity is being afforded.

(c) *Maintenance of programs.* Within 120 days from the commencement of the contract, each contractor shall maintain a copy of separate affirmative action compliance programs for each establishment, including evaluations of

utilization of minority group personnel and the job classification tables, at each local office responsible for the personnel matters of such establishment. An affirmative action compliance program shall be part of the manpower and training plans for each new establishment and shall be developed and made available prior to the staffing of such establishment. A report of the results of such program shall be compiled annually and the program shall be updated at that time. This information shall be made available to representatives of the agency or Director upon request and the contractor's affirmative action program and the result it produces shall be evaluated as part of compliance review activities.

* * *

41 C.F.R. PART 60-2—AFFIRMATIVE ACTION PROGRAMS [ORDER NO. 4]

Subpart A—General

§ 60–2.1 Title, purpose and scope.

This part shall also be known as "Order No. 4," and shall cover nonconstruction contractors. Section 60–1.40 of this chapter, Affirmative Action Compliance Programs, requires that within 120 days from the commencement of a contract each prime contractor or subcontractor with 50 or more employees and a contract of $50,000 or more develop a written affirmative action compliance program for each of its establishments. A review of agency compliance surveys indicates that many contractors do not have affirmative action programs on file at the time an establishment is visited by a compliance investigator. This part

details the agency review procedure and the results of a contractor's failure to develop and maintain an affirmative action program and then sets forth detailed guidelines to be used by contractors and Government agencies in developing and judging these programs as well as the good faith effort required to transform the programs from paper commitments to equal employment opportunity.

§ 60–2.2 Agency action.

(a) Any contractor required by § 60–1.40 to develop an affirmative action program at each of his establishments who has not complied fully with that section is not in compliance with Executive Order 11246 (30 F.R. 12319). Until such programs are developed and found to be acceptable in accordance with the standards and guidelines set forth in §§ 60–2.10 through 60–2.31, the contractor is unable to comply with the equal employment opportunity clause.

(b) If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within his agency or through the Office of Federal Contract Compliance or other Government agencies, that the contractor has not developed an acceptable affirmative action program at each of his establishments, the contracting officer shall declare the contractor-bidder nonresponsible unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations: *Provided,* That during the preaward conferences provided for in § 60–1.6 (d)(3), every effort shall be made through the processes of conciliation, mediation and persuasion to develop an ac-

ceptable affirmative action program meeting the standards and guidelines set forth in §§ 60–2.10 through 60–2.31 so that, in the performance of his contract, the contractor is able to meet his equal employment obligations in accordance with the equal opportunity clause and applicable rules, regulations and orders: *Provided further,* That when the contractor-bidder is declared nonresponsible more than once for inability to comply with the equal employment opportunity clause a notice setting a timely hearing date shall be issued concurrently with the second nonresponsibility determination in accordance with the provisions of § 60–1.26 proposing to declare such contractor-bidder ineligible for future contracts and subcontracts.

(c) Immediately upon finding that a contractor has no affirmative action program or that his program is not acceptable the contracting officer shall notify officials of the appropriate compliance agency and the Office of Federal Contract Compliance of such fact. The compliance agency shall issue a notice to the contractor giving him 30 days to show cause why enforcement proceedings under section 209(b) of Executive Order 11246, as amended, should not be instituted.

(1) If the contractor fails to show good cause for his failure or fails to remedy that failure by developing and implementing an acceptable affirmative action program within 30 days, the compliance agency, upon the approval of the Director, shall issue a notice of proposed cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts pursuant

to § 60–1.26(b), giving the contractor 10 days to request a hearing. If a request for hearing has not been received within 10 days from such notice, such contractor will be declared ineligible for future contracts and current contracts will be terminated for default.

(2) During the "show cause" period of 30 days every effort shall be made by the compliance agency through conciliation, mediation and persuasion to resolve the deficiencies which led to the determination of noncompliance or nonresponsibility. If satisfactory adjustments designed to bring the contractor into compliance are not concluded, the compliance agency, with the prior approval of the Director, shall promptly commence formal proceedings leading to the cancellation or termination of existing contracts or subcontracts and debarments from future contracts and subcontracts under § 60–1.26(b).

(d) During the "show cause" period and formal proceedings, each contracting agency must continue to determine the contractor's responsibility in considering whether or not to award a new or additional contract.

Subpart B—Required Contents of Affirmative Action Programs

§ 60–2.10 Purpose of affirmative action program.

An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work

are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate. An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and, further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to increase materially the utilization of minorities at all levels and in all segments of his work force where deficiencies exist.

§ 60–2.11 Required utilization analysis and goals.

Affirmative action programs must contain the following information:

(a) An analysis of all major job categories at the facility, with explanations if minorities are currently being under-utilized in any one or more job categories (job "category" herein meaning one or a group of jobs having similar content, wage rates and opportunities). "Underutilization" is defined as having fewer minorities in a particular job category than would reasonably be expected by their availability. In determining whether minorities are being underutilized in any job category, the contractor will consider at least all of the following factors:

(1) The minority population of the labor area surrounding the facility;

(2) The size of the minority unemployment force in the labor area surrounding the facility;

(3) The percentage of minority work force as compared with the total work force in the immediate labor area;

Appendix F

Statutes, Executive Order and Regulations Involved

(4) The general availability of minorities having requisite skills in the immediate labor area;

(5) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(6) The availability of promotable minority employees within the contractor's organization;

(7) The anticipated expansion, contraction and turnover of and in the work force;

(8) The existence of training institutions capable of training minorities in the requisite skills; and

(9) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

(b) Goals, timetables and affirmative action commitments must be designed to correct any identifiable deficiencies. Where deficiencies exist and where numbers or percentages are relevant in developing corrective action, the contractor shall establish and set forth specific goals and timetables. Such goals and timetables, with supporting data and the analysis thereof shall be a part of the contractor's written affirmative action program and shall be maintained at each establishment of the contractor. Where the contarctor has not established a goal his written affirmative action program must specifically analyze each of the factors listed in "a" above and must detail his reason for a lack of a goal. In establishments with over 1,000 employees, or where otherwise appropriate, goals and time-

tables may be presented by organizational unit. The goals and timetables should be attainable in terms of the contractor's analysis of his deficiencies and his entire affirmative action program. Thus, in establishing his goals and timetables the contractor should consider the results which could be reasonably expected from his good faith efforts to make his overall affirmative action program work. If he does not meet his goals and timetables, the contractor's "good faith efforts" shall be judged by whether he is following his program and attempting to make it work toward the attainment of his goals.

(c) Support data for the above analysis and program shall be compiled and maintained as part of the contractor's affirmative action program. This data should include progression line charts, seniority rosters, applicant flow data, and applicant rejection ratios indicating minority status.

(d) Based upon the Government's experience with compliance reviews under the Executive order programs and the contractor reporting system, over the past eight (8) years, minority groups are most likely to be underutilized in the following six (6) categories as defined by the Employer's Information Report, EEO–1: officials and managers, professionals, technicians, sales workers, office and clerical, and craftsmen (skilled). Therefore, the contractor shall direct special attention to these categories in his analysis and goal setting.

Appendix F

Statutes, Executive Order and Regulations Involved

§ 60-2.12 Additional required ingredients of affirmative action programs.

Effective and affirmative action programs shall contain, but not necessarily be limited to, the following ingredients:

(a) Development or reaffirmation of the contractor's equal employment opportunity policy in all personnel actions.

(b) Formal internal and external dissemination of the contractor's policy.

(c) Establishment of responsibilities for implementation of the contractor's affirmative action program.

(d) Identification of problem areas (deficiencies) by organizational units and job categories.

(e) Establishment of goals and objectives by organizational units and job category, including timetables for completion.

(f) Development and execution of action oriented programs designed to eliminate problems and further designed to attain established goals and objectives.

(g) Design and implementation of internal audit and reporting systems to measure effectiveness of the total program.

(h) Active support of local and national community action programs.

Appendix F

Statutes, Executive Order and Regulations Involved

§ 60–2.13 Compliance status.

No contractor's compliance status shall be judged alone by whether or not he reaches his goals and meets his timetables. Rather each contractor's compliance posture shall be reviewed and determined by reviewing the contents of his program, the extent of his adherence to his program, and his good faith efforts to make his program work toward the realization of the program's goals within the timetables set for completion. There follows an outline of suggestions and examples of procedures that contractors and federal agencies may use as guidelines for establishing, implementing, and judging an acceptable affirmative action program.

Subpart C—Suggested Method of Implementing the Requirements of Subpart B

§ 60–2.20 Development or reaffirmation of the equal ement opportunity policy.

(a) The contractor's policy statement should indicate the chief executive officers' attitude on the subject matter, assign overall responsibility and provide for a reporting or monitoring procedure. Specific items to be mentioned should include, but not limited to:

(1) Recruit, hire, and promote all job classifications without regard to race, color, religion, sex, or national origin, except where sex is a bona fide occupational qualification.

(2) Base decisions on employment so as to further the principle of equal employment opportunity.

(3) Insure that promotion decisions are in accord with principles of equal employment opportunity by imposing only valid requirements for promotional opportunities.

(4) Insure that all other personnel actions such as compensation, benefits, transfers, layoffs, return from layoff, company sponsored training, education, tuition assistance, social and recreation programs, will be administered without regard to race, color, religion, sex, or national origin, except where sex is a bona fide occupational qualification.

(b) The contractor should periodically conduct analyses of all personnel actions to insure equal opportunity.

[§§ 60-2.21 to 2.30 not reproduced]

Supreme Court, U.S.
FILED
SEP 12 1980
MICHAEL RODAK, JR., CLERK

No. 80-75

In the Supreme Court of the United States

OCTOBER TERM, 1979

KECO INDUSTRIES, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

LUTZ ALEXANDER PRAGER
WILLIAM H. NG
Attorneys
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-75

KECO INDUSTRIES, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

QUESTION PRESENTED

Whether petitioner was entitled to summary judgment in the Commission's enforcement action where the record, including a statistical workforce analysis prepared by petitioner as part of an affirmative action plan, disclosed evidence of sex discrimination affecting women other than the charging party (with whose claim the Commission's enforcement action was consolidated).

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Adickes v. *Kress & Co.*, 398 U.S. 144 5

Dothard v. *Rawlinson*, 433 U.S. 321 5

Emerson Electric Co. v. *Schlesinger*, 609 F. 2d 898 6

Fullilove v. *Klutznick*, No. 78-1007 (July 2, 1980) 4, 5

General Telephone Company of the Northwest, Inc. v. *EEOC*, No. 79-488 (May 12, 1980) 4

NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 5

Occidental Life Insurance Co. v. *EEOC*, 432 U.S. 355 4

Reynolds Metals Co. v. *Rumsfeld*, 417 F. Supp. 365, aff'd in relevant part, 564 F. 2d 663, cert. denied, 435 U.S. 995 6

United States v. *Miller*, 425 U.S. 435 6

Page

Cases—Continued:

United Steelworkers of America v. *Weber*, 443 U.S. 193 ..... 4, 5

Zap v. *United States*, 328 U.S. 624 6

Statutes, executive order and regulations:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.* 1

Section 709(c), 42 U.S.C. 2000e-8(c) 4

Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965), as amended 1, 5, 6

41 C.F.R. Part 60-2 (1971) 1

41 C.F.R. 60-2.1 (1971) 1

41 C.F.R. 60-20.6 (1971) 5

Miscellaneous:

35 Fed. Reg. 8889 (1970) 5

39 Fed. Reg. 35855-35856 (1974) 6

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 617 F. 2d 443. The orders of the district court (Pet. App. 11a-14a) are reported at 22 Fair Empl. Prac. Cas. 485.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a) was entered on March 20, 1980. A petition for rehearing was denied on April 18, 1980 (Pet. App. 10a). The petition for a writ of certiorari was filed on July 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1970, Lena Grimes filed a charge with the Equal Employment Opportunity Commission against Keco Industries, Inc., claiming that Keco had discriminated against her on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Pet. App. 2a). Grimes alleged that although she had performed the job of buyer, she had been paid a salary lower than that paid to male buyers (*ibid.*).

During the EEOC's investigation of the Grimes charge, it was given access to workforce data contained in an affirmative action program Keco had prepared in order to comply with Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965), as amended, and Order No. 4, 41 C.F.R. Part 60-2 (1971) (Pet. 2-3).[1] The affirmative action program was designed by Keco to "develop, direct and carefully

---

[1]Exec. Order No. 11246 (Pet. App. 17a-28a) prohibits government agencies from entering into contracts with firms that discriminate in employment. Order No. 4 (Pet. App. 32a-41a) requires a contractor to "develop a written affirmative action compliance program for each of its establishments." 41 C.F.R. 60-2.1 (1971).

monitor a program concerned with the employment, training and retention of *minority* and disadvantaged persons" (J.A. 76; emphasis added).[2] See Part III of Keco's affirmative action program plan (J.A. 77-78). Similar affirmative action features on behalf of women were not included in the plan.

The workforce data included an exhibit that, as the court of appeals found (Pet. App. 7a), showed that "in the General Assembly, Electrical Assembly and Refrigerator Assembly job classifications, the jobs appear to be segregated by sex and that the female jobs start at $.20 an hour less than the male jobs and end almost $.90 per hour less." Part VII of the affirmative action program, Keco's workforce analysis, stated (J.A. 85) that in 1970, Keco's office and clerical workforce was "predominated by females, with 86.36% of * * * this category being female" whereas only "9.09% of [the Officials and Managers] category are female." Thus, the program noted (*ibid.*) "a definite under-utilization of * * * female employees" in the Officials and Managers category. See Pet. App. 7a.

After the investigation was completed, the Commission's regional director found, *inter alia* (J.A. 99), that Grimes and a female who had replaced her had been paid, respectively, $200 and $275 per month less than a male who performed substantially the same job, and that assembly jobs at Keco were segregated according to sex, with a concomitant wage rate schedule that was higher for male employees than for female employees. The Commission adopted the regional director's findings (J.A. 104-105).

2. When conciliation efforts failed, the Commission brought this action, alleging that Keco had violated Title

---

[2]References to "J.A." are to the joint appendix filed in the court of appeals.

VII by maintaining sex-segregated job classifications, by failing to pay women on the same basis as men, by assigning women to lower paying clerical jobs and refusing to promote them to management and supervisory jobs, and by maintaining job classifications segregated on the basis of sex (Pet. App. 3a). The Commission also alleged that Keco had violated Title VII by failing to file annual reports required by Commission regulations (*ibid.*).

The Commission's action, which sought relief for women as a class and an injunction requiring Keco to file the reports, was consolidated with an individual Title VII action previously filed by Lena Grimes (Pet. App. 2a-4a). The district court entered summary judgment dismissing the Commission's action (Pet. App. 11a-12a) and denied the Commission's motion to reconsider on the ground (Pet. App. 14a) that the Commission's investigation had "produced nothing to warrant the allegations of the EEOC complaint * * * extending beyond the Grimes charge" (*ibid.*).

The court of appeals held (Pet. App. 8a) that the district court had erred in awarding summary judgment "since the record does disclose material issues of fact [broader than the Grimes charge]." Specifically, the court found (Pet. App. 4a, 8a) that the record revealed factual disputes regarding whether Keco had filed the proper reports with the EEOC and whether Keco maintained a sex-segregated job classification in its assembly classifications. Accordingly, the court of appeals reversed and remanded the action to the district court.

ARGUMENT

1. This case involves the application of well established principles of summary judgment law. The court of appeals

recognized that the Commission may bring an enforcement action for class-wide relief on behalf of women based on violations discovered during a reasonable investigation of a charge filed by a private party. *General Telephone Company of the Northwest, Inc.* v. *EEOC*, No. 79-488 (May 12, 1980), slip op. 12; see *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 372 & n.32 (1977). The Commission also may seek an injunction compelling an employer to file required reports. See Section 709(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-8(c). The court of appeals thus properly reversed the grant of summary judgment and remanded the cause for trial because the record disclosed factual disputes concerning the breadth of the sex discrimination found by the Commission's investigation and the employer's alleged failure to file the required reports. In these circumstances, further review is not warranted.

2. Keco does not dispute the court of appeals' interpretation of the law or the record. Instead, it appears to argue (Pet. 8-10) that this Court's decisions in *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979), and *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980) (plurality opinion), preclude the use of information contained in an affirmative action program as evidence in an EEOC sex discrimination suit.

a. This contention is not properly before the Court. In neither the district court nor the court of appeals did Keco argue that the Commission would be precluded from using in its enforcement action information ascertained from Keco's affirmative action program. Rather, it argued only that the Commission had not discovered *any* evidence of sex discrimination beyond that contained in the Grimes charge. In response to the Commission's reliance, before the court of appeals, on the information contained in Keco's affirmative action

program, Keco argued only (Brief for Appellee filed in the court of appeals at 7) that such information was "in no way prejudicial" to it. Having failed to raise the contention below, Keco cannot, in the first instance, present it to this Court. See *Dothard* v. *Rawlinson*, 433 U.S. 321, 323 n.1 (1977); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

b. In any event, nothing in *Weber*, *supra*, or *Fullilove*, *supra*, suggests that an employer's adoption of an affirmative action program designed to benefit minority group members can shield the employer from a Title VII action seeking relief on behalf of women.

Nor does government approval of Keco's 1970 affirmative action program in favor of minorities have any bearing on the merits of the Commission's present claim of sex discrimination by Keco. In 1970, regulations issued under Exec. Order No. 11246, *supra,* only required contractors to develop affirmative action programs for minorities (Pet. App. 30a-32a, 36a-38a). Affirmative action for women was limited to requiring government contractors to make a general affirmation that employment decisions would not be based on sex (Pet. App. 40a-41a), to recruit women to apply for jobs from which they previously had been excluded (OFCC, Sex Discrimination Guidelines, 41 C.F.R. 60-20.6, 35 Fed. Reg. 8889 (1970)), and to include women candidates in management trainee programs (*ibid.*). Government approval of Keco's 1970 affirmative action program therefore has no relevance to the claim of sex discrimination asserted in this case (see pages 2-3, *supra*).[3]

---

[3]In informing Keco that its affirmative action program complied with Revised Order No. 4, the Defense Supply Agency had noted that "[y]our concern with the utilization of *minority* group persons * * * is sincerely appreciated" (Pet. 4; emphasis added).

c. Moreover, affirmative action programs and workforce analyses are not privileged; no statute or rule of evidence precludes their use in judicial proceedings where the information they contain is relevant. Indeed, government contractors prepare them with the knowledge that they may be used to disqualify them from receiving government contracts on the ground of noncompliance with Exec. Order No. 11246, *supra*. No public policy prevents the use of such documents as evidence of noncompliance with Title VII, a statute that complements the mandates of the Executive Order.[4]

Finally, in the present case, Keco voluntarily supplied the Commission and the courts below with a copy of its workforce analysis in an attempt to demonstrate that it does not discriminate. Thus, even if there were a privilege against the use of such a document as evidence in an EEOC proceeding, Keco waived the protection thereof by voluntarily submitting the program to the Commission and the courts below. Cf. *United States* v. *Miller*, 425 U.S. 435, 442-443 (1976); *Zap* v. *United States*, 328 U.S. 624, 628-630 (1946).

---

[4]The federal interest in enforcing these overlapping provisions has resulted in liberal exchanges of information, including affirmative action plans and workforce analyses, between the Commission and the Department of Labor's Office of Federal Contract Compliance Programs. See Memorandum of Understanding, 39 Fed. Reg. 35855-35856 (1974). The informational exchange provided for in the Memorandum of Understanding has been upheld by the courts. *Emerson Electric Co.* v. *Schlesinger*, 609 F. 2d 898 (8th Cir. 1979); *Reynolds Metals Co.* v. *Rumsfeld*, 417 F. Supp. 365 (E.D. Va. 1976), aff'd in relevant part, 564 F. 2d 663 (4th Cir. 1977), cert. denied, 435 U.S. 995 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

LUTZ ALEXANDER PRAGER
WILLIAM H. NG
Attorneys
Equal Employment Opportunity Commission

SEPTEMBER 1980

DOJ-1980-09